IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6623 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE KUNDAN SINGH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ELECON ENGINEERING CO. LTD.

Versus

GUJARAT MINERAL DEVELOPMENT CORPORATION LTD.

Appearance:

MR. S.I. NANAVATI, Sr. Advocate with MR.D.S. NANAVATI with MR.SAURIN MEHTA for Petitioners

MR. S.B.VAKIL, Sr. Advocate with MR ASPI M KAPADIA for Respondent No. 1

MR.S.B.VAKIL, Sr. Advocate with MR A.S. VAKIL with MR. SATYAJIT MITRA for Respondent No. 2

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE KUNDAN SINGH

Date of decision: 13/09/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. The petitioners have challenged the action of the respondent No.1 - Gujarat Mineral Development Corporation Ltd. in issuing Letter of Intent dated 11th July 2002 in favour the respondent No.2 - M/s TRF Limited, for award of the contract for Designing, Engineering, Manufacture, Supply, Transportation, Erection, Testing and Commissioning of 600 TPH Lignite Handling System and 300 TPH Lime Handling System on turnkey basis for its Akrimota Thermal Power Project, and have sought a direction on the respondent No.1 to disqualify the tender of the respondent No.2.

2. The petitioner No.1 is a public limited company engaged in the field of design, engineering, manufacture, supply, installation of bulk material handling plants and equipments for power and other industries. The respondent No.1 invited tenders for their Akrimota Thermal Power Project on 1st March 2001. The tender documents contained details about the scope of work and other instructions and conditions. The last date and time of submission of tender consisting of technical and commercial bid (Part I) was 3rd August 2001 upto 14.00 hrs. Part II consisted of original price bid.

2.1 After some correspondence between the tenderers and the respondent No.1, the respondent No.1 issued clarifications in form of Updated Tender Specifications on 21st May 2001, as per Annexure "B" to the petition and the due date of submission was extended upto 8th June 2001 for submitting technical and commercial bid and the price bid in two separate sealed envelopes. The bidders submitted their offers on 20th June 2001.

2.2 After receiving the bids, the respondent No.1 sought clarification with regard to the commercial and technical issues which were submitted by the bidders. Ultimately, the respondent No.1, on 4th September 2001, notified to the bidders about the frozen plant requirements, as per Annexure "C" to the petition. On 5th September 2001, the respondent No.1 forwarded to the bidders general (commercial) points to be considered by all the bidders for the revised price bid in Annexure "1-A" of that letter, which was to be considered alongwith other Annexures sent with the letter dated 4th

September 2001 for revising the price bid. On 15th September 2001, the respondent No.1, referring to its earlier letters dated 4-9-2001, 5-9-2001 and 7-9-2001, intimated to the bidders that their price bid for the said tender was to be submitted latest by 15.00 hrs. of 19-9-2001, and that it would be opened on the same day by 16.00 hrs. The bidders were requested to confirm adherence to the requirement of the respondent No.1 finalized after post-bid meetings as intimated in the aforesaid letters. They were also intimated that -

"a specific confirmation about adherence to all the requirements may be given on the corresponding Annexures / Letter duly signed by the Authorised Signatory latest by 18-9-2001. If this confirmation is not received, the price bid shall not be opened.

Please note that deviations are not acceptable."

(emphasis added)

2.3 According to the petitioner No.1, pursuant to this communication, it had sent confirmation on 18th September 2001 and submitted the price bid in a sealed cover on 19th September 2001. In the said letter dated 18th September 2001, at Annexure "F" to the petition, the petitioner No.1 informed the respondent No.1, referring to its earlier letters, "We confirm our adherence to the requirements finalized by GMDC after post bid meeting held between us on 1-9-2001 and intimated to us vide letters at Srl. No. 2, 3 & 4 under reference". The letters duly signed were forwarded as required.

2.4 On 19th September 2001, the price bids were opened as scheduled in presence of the bidders and according to the petitioners, they came to know that the lowest bid was of the respondent No.2 - TRF and the bid of the petitioner No.1 was the second lowest. When the price bid of the respondent No.2 was readover, it was noticed that the respondent No.2 had made a conditional offer, with respect to the commercial conditions, offering imported goods on high seas sale basis as against the GMDC's requirement to deliver the goods at the project site. It was also stated in that price bid that the exchange rate variations shall be payable by the respondent No.1. According to the petitioners, these two conditions specified in the offer of the respondent No.2 were in conflict with the mandatory conditions of the tender and the undertaking taken from the bidders that

their offers would conform to the conditions communicated to them in the said letters of the respondent No.1. After opening the bids, evaluation was carried out by the respondent No.1 in respect of cost loading on account of differential power consumption as per Clause II.17.02, (sheet 214) and free issue of cement and re-inforcement steel for civil works based on quantities indicated by the bidder as per Clause II.9.50 and schedule - M. According to the petitioners, as directed by the Government, the respondent No.1 further evaluated the bids, exempting CST and GST components. It is the petitioners' case that on comparison of prices quoted by the bidders and evaluated as per relevant tender conditions and also considering exemption of CST and GST as directed by the State Government, the price quoted by the petitioners of Rs.74=40 crores was net evaluated at Rs.75=30 crores, while that of the respondent No.2, which was quoted at Rs.65=80 crores was net evaluated at Rs.75=06 crores. It is alleged that the prices of the respondent No.1 as quoted and evaluated, although the lowest, were based on major deviations from the tender conditions, and that the respondent No.1 violated the tender evaluation criteria incorporated in Clause II.17.0, ignoring the loading that was required to be done on account of such commercial deviations and issued Letter of Intent on 11-7-2002, which fact the petitioners came to know due to the caveat filed by the respondent No.2 on 15th July 2002.

2.5 The petitioners had sent letters dated 30th April 2002 and 19th June 2002 (copies at Annexure "H" collectively), bringing to the notice of the respondent No.1 the irregularities in the tender of the respondent No.2. It is alleged that the respondent No.2, with an ulterior motive and for the reasons best known to the respondent No.1, was given the contract in violation of the provisions of Article 14 of the Constitution. Inspite of the clear stipulation that no deviation from the terms and conditions will be allowed and though the bidders had submitted their confirmation letters that the bids will conform to the terms and conditions communicated to them in the said letters, the respondent No.2 had deviated from the mandatory terms with respect to delivery of material at site on F.O.R. basis and the terms of payment by making a counter proposal to the respondent No.1 in respect of arranging the "sale on high seas basis" for the items which were to be imported requiring the respondent No.1 to pay the custom duty directly. It is contended that, by offering high seas sale, the respondent No.2 automatically got an exemption from the liability of State sales tax and derived the

benefit of competitive price. Such a course amounted to deviation in violation of the mandatory condition of providing delivery at the project site. It is alleged that, by allowing such a bid of the respondent No.2, the respondent No.1 had shown favouritism towards the respondent No.2 and the decision making process was vitiated. It is also the petitioners' case that the respondent No.2 has not only deviated from the requirement of "firm price offer" as per Clause 2(c) of the tender terms and conditions, but it also did not comply with the conditions communicated alongwith the letter dated 5th September 2001 in Annexure "1-A" thereto, in which it was specifically stated that, there shall not be any escalation of price and variation in exchange rate. The respondent No.2 had quoted the price subject to condition of price variation on account of variation in the exchange rate, and therefore, according to the petitioners, its bid ought to have been rejected at the threshold. It is contended that award of the contract to the respondent No.2 was not only arbitrary and illegal, but also amounted to favouritism and was therefore malafide.

2.6 The petitioner No.1 filed additional affidavit dated 2nd September 2002 placing on record certain documents which included copy of the price bid submitted by the respondent No.2 and the communications between the parties.

3. In the affidavit-in-reply filed on behalf of the Respondent No.1 - Corporation, a preliminary objection was taken to the effect that the petitioners had not quoted separate prices for the two plants but quoted a total price of Rs.7,439=45 lacs though Schedule - B, i.e. the Schedule of Prices contained in the Updated Technical Specifications, required the tenderer to submit a lumpsum firm price for design, manufacture, supply and delivery separately for the Lignite Handling Plant and the Lime Handling Plant. Moreover, the petitioners had quoted for the two plants lumpsum price mentioning "crusher" and not "sizer", which was required to be mentioned as per the Updated Technical Specifications. Since a Sizer is more expensive than a crusher, this was, according to the respondent No.1, a major deviation in the schedule of prices of the petitioners. A copy of the petitioners' letter dated 18-9-2001 and a copy of Schedule - B i.e. Schedule of Prices submitted by the petitioner are annexed at Annexure "1" and "2" to the said reply. The petitioners had not given total power consumption (KW) equipment-wise, as required, but had given guaranteed power consumption for various paths, as per Annexure "3"

to the said reply. Since pathwise equipments were not shown, according to the respondent No.1, it would be difficult to work out whether any loading and if yes, what load in price was required to be given in the price bid of the petitioner company. As regards the Schedule of Prices (i.e. Schedule - B), of the respondent No.2, it has been admitted in para 6 of the reply that it contained the said two notes as per Annexure "4" to the reply. According to the respondent No.1, the bidders were required to give a specific confirmation about adherence to all the requirements in its letters dated 4-9-2001, 5-9-2001 and 7-9-2001 and that the respondent No.2 had by its letter dated 19-9-2001, a copy of which is at Annexure "5" to the reply, confirmed that they will adhere to all the requirements of the respondent No.1. Since the pathwise power consumption in the tender of the petitioners was the lowest, it was treated as a base for working out loading of price related to power consumption for the other bidders. It is then stated that the petitioners had quoted for Crusher instead of Sizer, which could also call for price loading, since the cost of Sizers would be much higher than the Crushers. It is stated in paragraph 6 of the affidavit-in-reply that; "Since the petitioner does not dispute that TRF is the lowest bidder, it is not necessary to examine in detail the question of loading the price". According to the respondent No.1, since no sales tax was payable on imported goods, no loading was required to be considered in the bid of the respondent No.2. Moreover, since the respondent No.2 had, by its letter dated 19-9-2001, confirmed that only statutory variations shall be payable on taxes and duties in percentage, there was no question of respondent No.2 claiming any such sales tax on the imported goods. It was stated that since the respondent No.1 did not agree to sale on high seas for the imported items, the contingency of loading of interest at 18% for the period of atleast six months on the amount of custom duty and port clearance charges did not arise and therefore, "there was no question of loading the price bid of the respondent No.2". In paragraph 7 of the affidavit-in-reply, the respondent No.1 has taken the stand that, in view of the confirmations given by the respondent No.2 - TRF in its letter dated 19-9-2001, the price bid submitted by the respondent No.2 was not in contradiction with any undertaking given by it to the respondent No.1. It is stated that the respondent No.1, by its letter dated 10th July 2002 (copy at Annexure "6" to the affidavit-in-reply), sought re-confirmation of the petitioner on five points specified therein and the respondent No.2 had re-confirmed the same. It is stated in para 7 of the reply that, "The only reason for which

contract has been given to TRF is that its tender has been found to be the most competitive and in the interest of GMDC. In the price comparison, TRF was found to offer lowest ex-factory price. Even after applying evaluation criteria on the basis of tender conditions, TRF still was the lowest bidder."

3.1 The respondent No.2, in its affidavit-in-reply, reiterated the preliminary objections which have been raised by the respondent No.1, stating that, any judicial relief at the instance of the petitioner, whose tender / offer did not comply with the terms and conditions of the tender, would be misplaced. It was also submitted in paragraph 3.2 of its reply that, Section D of the terms and conditions in Tender Volume I indicated that it would be permissible to a contractor to indicate / bring out technical and commercial deviations and in that sense, the specification may not be mandatory. In paragraph 3.3 of the reply, it is admitted that the respondent No.2 "made a conditional offer with respect to commercial condition offering imported goods on high sea sale transactions as against GMDC's requirement to deliver the goods to project site. Schedule - B of Prices in the tender / offer of TRF contains three notes. .....". It is stated that the note regarding arrangement of sale on high seas for the imported items like Sizer, Crushers and flip flop screens was an option offered to the respondent No.1 by the revised price bid of the respondent No.2, and that, since by its letter dated 10th July 2002 (copy annexed at Annexure "I" to the reply), informed the respondent No.2 that the high seas was not permitted, the respondent No.2 confirmed the same, and therefore, in execution of the project by the respondent No.2, no question of high seas sale was involved. It is stated that since the respondent No.1, by its letter dated 10th July 2001, informed the respondent No.2 that exchange rate variation was not permitted and the respondent No.2 confirmed the same, there was no deviation done by the respondent No.2. Moreover, once the respondent No.2 confirmed that there would be no high seas sale of imported items, the question of custom duty, port clearance charges to be paid by the respondent No.2 in advance, did not survive and therefore, there was no question of loading the prices quoted by the respondent No.2 on those counts. It is denied that any mandatory condition was ignored by the respondent No.2 or that the treatment similar to that given to the respondent No.2 was not extended to the other bidders.

3.2 In response to the additional affidavit dated 2nd September 2002 of the petitioners, the respondent No.1

placed on record the events that took place after the issuance of the Letter of Intent dated 11-7-2002, pointing out that the Work Order was issued by it to the respondent No.2 on 26-7-2002. Copies of the Letter of Intent and Work Order are placed at Annexure "1" and "2" of the said further reply dated 4th September 2002. In paragraph 5 of the said affidavit-in-reply, while referring to the Schedule of Prices of the respondent No.2, the respondent No.1 admitted that it had not given schedule of unit prices for material handling plant components in Srl. No. 4.0 of Schedule of Prices. It was, however, stated that "the price bid of the petitioner was not rejected on the ground that the petitioner in Schedule of Prices of its tender did not give break up of ex-works firm price of material handling plant equipment as per 2.02 (a) or had failed to give in the schedule of price unit price for material handling plant components". It was stated that this aspect had been referred to in the affidavit-in-reply on behalf of the respondent No.1 only in support of the preliminary objection that the petitioner is not entitled to maintain the petition. It is stated that the letter dated 19-9-2001 of confirmation sent by the second respondent was received by the respondent No.1 before the price bids were opened on that day. It is then stated that the respondent No.2, in its tender, had indicated separately custom duty of Rs.1,32,30,000=00 and therefore, if the second respondent was not required to pay customs duty in the event of high seas sale, the custom duty of Rs.1,32,30,000=00 separately shown in the second respondent's price would be required to be deducted, and therefore, it would have made no difference if the respondent No.1 were required to pay the customs duty in the event of high seas sale. It is further stated in paragraph 5.2 of the reply that in the event of high seas sale, no sales tax at 4% or at all would have been required to be paid since such tax was payable when sale of goods was made within the State. Moreover, even in case of high seas sale and assuming that respondent No.1 was required to pay port clearance and forwarding charges, it would have recovered the same from the respondent No.2. The calculation of interest for a period of six months by the petitioner on the amount of customs duty that the respondent No.1 would have had paid if the high seas sale took place, was disputed, and as stated in paragraph 5.3 of the reply, such interest would be required to be calculated at 12.5% per annum for a period of one month which amount would come to Rs.1,37,812=50. The cost loading calculation of Rs.1,12,65,000=00 for variation in exchange rate made by the petitioner is disputed, and in paragraph 5.4 of the

reply, it is stated that such variation in exchange rate was relatable only to customs duty and not to the entire landed costs of the imported goods. According to the respondent No.1, the petitioner had submitted a statement on 16-5-2001, as per Annexure "4" to the said reply, in which loading on account of variation in exchange rate was calculated on customs duty and not on the landed cost. It is stated that, any calculation of variation in exchange rate was hypothetical, because, it would be difficult to predicate whether on the date of the clearance of the imported consignment 1 Euro would be equal to Rs.42=09 ps. or higher or lower than that. It is pointed out that, in July 2002, 1 Euro was equal to Rs.49=00 and in the next month, it went down to Rs.47=00. It is finally stated in paragraph 5.5 of the reply that, even if the part charges were required to be loaded on the price offered by the respondent No.2, the loading would be of Rs.12,10,000=00 for port charges and Rs.1,37,812=50 ps. for interest on customs duty and port charges aggregating to Rs.13,47,812=50 ps. which was lower than the difference of Rs.24,00,000=00 in the prices given by the petitioners in paragraph 4.12 of the petition.

4. It has been contended on behalf of the petitioners that the revised price bid of the respondent No.2 did not meet with the mandatory conditions of the tender and therefore, its bid should have been rejected when it was opened on 19-9-2001 and by not doing so, the respondent No.1 has acted arbitrarily and in violation of Article 14 of the Constitution. It was submitted that, as per Clause 2(c)(i) of the tender terms and conditions read with letters dated 4-9-2001, 5-9-2001 and 15-9-2001 of the respondent No.1, there were mandatory stipulations that the prices offered would be firm, the price was to be quoted on the basis of free delivery at the project site on door delivery basis and that exchange rate variation was not payable. Since these conditions were mandatory, they could not have been relaxed by the respondent No.1. It was submitted that, after a lapse of about eight months, the respondent No.2 was given a special opportunity by communication dated 10th July 2002 sent by the respondent No.1 to change its bid conditions, without giving any such opportunity of altering the revised price bid to the petitioner, who was the next lowest tenderer. Such a course was calculated to favour the respondent No.2, because, without such opportunity, the deviated price bid of the respondent No.2 was liable to be rejected at the threshold. It was submitted that, by quoting the price with a rider that the goods imported by the respondent No.2 will be delivered on the high seas

basis, the respondent No.2 was benefitting in sales tax to the tune of Rs.30,05,000=00 and on the variation in exchange rate, at Rs.1,12,65,000=00, as worked out in a sheet attached to the additional affidavit of the petitioners, dated 2nd September 2002. Moreover, by this process, the respondent No.2 was also saving port clearance and forwarding charges to the tune of Rs.12,00,000=00 as well as interest on customs duty amount which would have been paid by the respondent No.1 to the tune of Rs.11,90,000=00. As regards the exchange rate variation, it was submitted that, in context of the base exchange rate of Rs.42=09 adopted in note - 3 of the Schedule - B of the prices quoted by the respondent No.2, the additional liability on the respondent No.2 would have gone upto Rs.1,12,65,000=00 on the basis of the exchange rate that prevailed on 30th August 2002 of Rs.48=50 which difference came to 15%. Thus, according to the learned senior counsel, if proper evaluation of the bids of the petitioners and the respondent No.2 was done, the difference in the price bid due to technical loading of Rs.24,00,000=00 would have vanished and the net difference of price quoted by the petitioners and the respondent No.2 would have tilted in favour of the petitioners by Rs.1,30,165=00.

4.1 In support of the above contentions, the learned Senior Counsel relied on the following decisions :

[a] The decision of the Supreme Court in Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation, reported in (2000) 5 SCC 287 was cited for the proposition that, in the matters of tender process and award of contract, while public interest is paramount, there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. The legal position was summed up by stating that the Government was free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest, and that the Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate. It was also a settled position that it is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons. On the facts of the case, it was held that the High

Court was justified in setting aside the award of contract in favour of the appellant because the appellant had not fulfilled the conditions relating to clause 6(a) of the Tender Notice, but the same was deleted subsequent to the last date of acceptance of the tenders. It was held in paragraph 14 of the judgement that the authority calling for the tenders is the best judge on the question whether the new tender conditions were better than what were prescribed earlier.

[b] The decision of the Supreme Court in Sterling Computers Ltd. v. M/s M & N Publications Ltd. and others, reported in (1993) 1 SCC 445 was cited for the proposition that, even while taking decision in respect of commercial transactions, a public authority must be guided by relevant considerations and not by irrelevant ones. If such decision is influenced by extraneous considerations, which it ought not to have taken into account, the ultimate decision is bound to be vitiated, even if it is established that such decision had been taken without bias. It was held that the action or the procedure adopted by the authorities which can be held to be State within the meaning of Article 12, while awarding contracts in respect of properties belonging to the State, can be judged and tested in the light of Article 14. The executive does not have an absolute discretion in the matter of grant of any privilege to others. It was held that the norms and procedures prescribed by the Government and indicated by courts have to be more strictly followed while awarding contracts which have along with a commercial element a public purpose. The Supreme Court held that the decision making process was open to judicial review though the court cannot act as an appellate authority. If the decision making process was violative of Article 14, the Court can strike down the decision and action taken pursuant thereto.

[c] The decision of the Supreme Court in Tata Cellular v. Union of India, reported in (1994)6 SCC 651 was cited for the proposition that the principle of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. The Government, as a guardian of the finances of the State, was expected to protect the financial interest of the State and

the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. The right to choose cannot be considered to be an arbitrary power, and if the power is exercised for any collateral purpose, the exercise of that power will be struck down. It was held that the duty of the Court was thus to confine itself to the question of legality, and the Court was concerned as to whether a decision-making authority exceeded its powers or committed an error of law or committed a breach of the rules of natural justice or reached a decision which no reasonable tribunal would have reached, or abused its powers. It was also held that it was open to the court to review the decision-maker's evaluation of the facts and the court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker.

[d] The decision of the Supreme Court in G.J.Fernandez v. State of Karnataka, reported in 1990 (2) SCC 488 was cited to point out that it was held in paragraph 15 of the judgement that any deviation from the guidelines, if made, should not result in arbitrariness or discrimination. Where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general, guidelines cannot be deviated.

[e] The decision of the Supreme Court in Ramana Dayaram Shetty v. International Airport Authority of India, reported in (1979) 3 SCC 489, was cited for the proposition that the State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. It was held that this proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. In paragraph 12 of the judgement, it was held that the power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in

any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory. In paragraph 34 of the judgement, the Supreme Court held that, both having regard to the constitutional mandate of Article 14 as also the judicially evolved rule of administrative law, the State authority was not entitled to act arbitrarily in accepting the tender of a party, but was bound to conform to the standard or norm laid down in the notice inviting tenders. It was held that once the standard or norm which was reasonable and non-discriminatory was laid down, the authority was not entitled to depart from it and to award the contract to the respondent who did not satisfy the condition of eligibility prescribed by the standard or norm. It was held that if there was no acceptable tender from a person to satisfy the condition of eligibility, the respondent authority could have rejected the tender and invited fresh tenders on the basis of a less stringent standard or norm, but it could not depart from the standard or norm prescribed by it and arbitrarily accept the tender of the respondent No.4. The Court held that the action of the respondent No.1 authority in accepting the tender of the respondent No.4 even though they did not satisfy the prescribed condition of eligibility, was clearly discriminatory, since it excluded other persons similarly situate from tendering for the contract and that it was also arbitrary and without reason.

[f] The decision of the Supreme Court in Minerals & Metals Trading Corporation of India Ltd. v. Sales Tax Officer, reported in 1998(7) SCC 19 was cited for the proposition that high seas sale was not liable to sales tax.

[g] The decision of the Supreme Court in Harminder Singh Arora v. Union of India and others, reported in (1986) 3 SCC 247 was referred in order to point out that, in paragraph 19 of the judgement, the Supreme Court held that, if the tender form submitted by any party is not in conformity with the conditions of the tender notice, the same should not have been accepted. It was held that the concerned authority had

arbitrarily and in a fanciful manner, accepted the tender of the respondent No.4. The Court held that the State or its instrumentality has to act in accordance with the conditions laid down in the tender notice, and that if the authorities chose to accept the tender of respondent No.4 for supplying pasteurized milk, the appellant should also have been given an opportunity to change his tender. In paragraph 29 of the judgement, the Supreme Court held that if the authority or the State Government chooses to invite tenders, then it must abide by the result of the tender and cannot arbitrarily and capriciously accept the bid of respondent No.4 although it was much higher and to the detriment of the State.

[h] The decision of the Supreme Curt in West Bengal Electricity Board v. Patel Engineering Co. Ltd., reported in AIR 2001 SC 682 was referred to point out that, in paragraph 25 of the judgement, the Supreme Court held that it was essential to maintain the sanctity and integrity of process of tender / bid and also award of a contract. The Court held; "In a work of this nature and magnitude where bidders who fulfill pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing Rules / Instructions is to ensure their enforcement lest the Rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under I.T.B. by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubt in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. ..... Where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in compliance with the Rules. ..."

In paragraph 32 of the judgement, the Supreme Court observed that, "The mode of execution of the work of the project should also ensure that

the public interest is best served. Tenders are invited on the basis of competitive bidding for execution of work of the project as it serves given purposes. On the one hand, it offers a fair opportunity to all those who are interested in competing for the contract relating to execution of the work and on the other hand, it affords the appellant a choice to select the best of the competitors on competitive price without prejudice to the quality of the work. Above all it eliminates favouritism and discrimination in awarding public works to contractors. The contract is, therefore, awarded normally to the lowest tenderer which is in public interest. The principle of awarding contracts to the lowest tenderer applies when all things are equal. It is equally in public interest to adhere to the rules and conditions subject to which bids are invited."

[i] The decision of the Supreme Court in Dutta Associates Pvt. Ltd. v. Indo Merchantiles Pvt. Ltd., reported in (1997) 1 SCC 53 was cited for the proposition that whatever procedure the Government proposes to follow in accepting tender must be clearly stated in the tender notice and that any abuse of powers for extraneous reasons would expose the authorities concerned to appropriate penalties. It was held that, having determined the "viability range", the Government called upon only the appellant to make a counter offer to come within the "viability range" and his revised offer at the higher of the "viability range" was accepted. It was found that no such opportunity to make a counter - offer was given to any other tenderers including the first respondent, which was a vitiating factor.

[j] The decision of the Supreme Court in Kanhaiya Lal Agrawal v. Union of India, reported in (2002) 6 SCC 315 was referred to for the proposition that the Court is normally reluctant to intervene in matters of entering into contracts by the Government, but if the same is found to be unreasonable, arbitrary, mala fide or is in disregard of mandatory procedures it will not hesitate to nullify or rectify such actions. The Supreme Court held that it was settled law that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition

is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto. If non-fulfilment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term. The Supreme Court reiterated this legal position on the basis of its earlier decision in G.J. Fernandez v. State of Karnataka, reported in (1990) 2 SCC 488.

[k] The decision of the Bombay High Court in Larsen & Toubro Ltd. v. Gujarat State Petroleum Corporation Ltd., XLI (2) 2000(2) 1814 was cited for the proposition that when it comes to the matter of exceeding or abusing the authority to bring about a contractual transaction the judicial review is permissible to prevent arbitrariness in the matter in which the public authority functions while entering into a contract.

[l] The decision of the Bombay High Court in Konark Infrastructure Pvt. Ltd. v. Commissioner, Ulhasnagar Municipal Corporation, reported in AIR 2000 BOMBAY 389 was cited to point out that the High Court held that the Municipal Commissioner had acted arbitrarily in considering the bid of the highest bidder which did not fulfill the eligibility conditions on the last date which was prescribed for the submission of bids. The Municipal Commissioner, in view of the well settled position in law, was bound to consider each bid in terms of the tender conditions which had been prescribed and which were in existence on the date prescribed for the submission of offers. Even if the tender conditions were to be relaxed thereafter, the benefit of relaxation could not have been made available only to the existing bidders since the relaxation operated to widen the field of eligibility and competition.

5. The learned senior counsel appearing for the respondent Nos.1 and 2, stating that there was no conflict between the interests of the respondents Nos. 1 and 2, has argued the matter for both the respondent No.1 authority and the respondent No.2 tenderer.

5.1 The learned senior counsel appearing for the respondents Nos. 1 and 2 raised a preliminary objection against the maintainability of the petition on the ground that no relief could be granted to the petitioner who was

not eligible as per the terms and conditions of the contract on three grounds. It was submitted that the tender of the petitioner was not in conformity with the terms and conditions of the original tender as well as U.T.S. (Updated Technical Specifications). It was pointed out from the petitioners' pricebid, a copy of which is at Annexure "II" to the affidavit-in-reply of the respondent No.1(Schedule B being the Schedule of Prices), that the petitioner company had not given separate prices for the lignite handling plant and lime handling plant, but had quoted a lumpsum price in its said revised price bid for both lignite and lime handling plants. It was then stated that the petitioners had offered "crusher" instead of "sizer" in the Schedule of Prices at Srl. No. 1(a) & (b), pointing out from the proforma Schedule - B which is in Volume II "Updated Technical Specifications for Material Handling Plant in Auxiliaries" that, against Srl. No. 1(a), prices were to be quoted for "Lignite Handling Plant" as specified as per enclosed layout drawing including Sizer, stacker cum reclaimer and crusher system for lignite and other systems as specified"; and against Srl.No.1(b), for "lime handling plant as specified as per enclosed layout drawing including sizer, impact crushers and other systems as specified"; while in Schedule - B filled in by the petitioner as per Annexure "II" to the petition, against these two items "crusher" was mentioned and not "sizer" which means that the petitioner was offering a different type of machinery instead of sizers which were required to be supplied as per the terms of the contract. It was further pointed out that there was non-confirmation on the part of the petitioners by not giving the break-up of consumption of electricity equipment-wise as required under the terms and conditions of the contract, and that, by giving a break-up path-wise, instead of equipment-wise, of the power consumption, the petitioners had not complied with the requirements of the tender. Initially, one more inconsistency was pointed out as to the petitioners' not giving a break-up equipment-wise in the schedule, but later on, that aspect was not pursued, since, even the respondent No.2 had not given a break-up in its revised price bid in Schedule B in respect of the material handling plant components covered under clause (4) of that schedule. The learned senior counsel submitted that, in view of the deviations in the petitioners' standard, the petitioner company could not have been considered as eligible and therefore, the petition was not maintainable at the instance of such an ineligible petitioner. It was submitted that these non-compliances made the petitioners' bid totally unacceptable and it

could not be made responsive by any process of loading of the price quoted by the petitioners, and that irrespective of whether anything could be said against the acceptance of the bid of the respondent No.2, it would be impossible to accept the bid of the petitioners. If that be so, at the instance of the petitioners, this petition could not be entertained. It was submitted that though the petitioners' bid was not rejected on the aforesaid grounds, and these aspects were not required to be taken into account, because, the petitioner was not the lowest bidder, it was open for the respondents to contend before this Court that, at the instance of such an ineligible petitioner, the Court should not exercise its discretionary power, particularly when this was not a public interest litigation. It was submitted that what was required by the tender conditions was "sizers" and "impact crushers" needed for the two plants, while the petitioner had quoted the price bid mentioning "crushers" only. The sizers were costlier than the crushers and even if it was a mistake in mentioning crushers instead of sizers on the part of the petitioner, the respondent No.1 - Corporation cannot proceed upon the petitioner's mistake. It was also submitted that there was no meaning in evaluating the bid of the petitioner unless it could have taken its bid to a price lower than the price quoted by the respondent No.2. It was submitted that using "crusher" at certain places and "sizers" at other places in its Schedule of Prices by the petitioner was nothing else but a smart exercise meant to throw dust in the eyes of the respondent No.1 and to hoodwink them in a technical tender. A tenderer who comes with a plea of mistake shows poor credentials and is not fit to be given a contract of this type, argued the learned senior counsel. It was also submitted that the petitioner's bid was not capable of evaluation in absence of equipment-wise guaranteed power generation. It was submitted that the petitioners had not mentioned in Schedule - D equipment-wise power consumption. It was submitted that the expression "total power consumption" in clause 16.30.4 (sheet 213 of Volume II) did not mean only total power consumption, but total equipment-wise power consumption. The learned senior counsel took us through various clauses of the Updated Technical Specifications in support of his arguments. It was submitted that if the preliminary objection of the respondents is upheld, then no occasion would arise to decide the other points raised in the matter. He submitted that a bidder who submits a bid for something which is not asked for, is not a bidder at all, and that a bidder would be one who bids for the items which are invited. There is, therefore, no violation of Article 14

of the Constitution. Even if as a result of loading the price quoted by the respondent No.2 is raised, it will not become higher than the price quoted by the petitioner and therefore, there was no violation of Article 14 of the Constitution. It was submitted that the price bid of the respondent No.2 was not required to be loaded on the basis of two alleged deviations contained in notes 2 and 3 of the Schedule of Prices filed by the respondent No.2. It was contended that, since no sales tax was payable on high seas sale of goods, there was no question of any additional liability on the part of the respondent No.1 Corporation arising from the stipulation contained in note - 2 of Schedule B of the revised price bid filed by the respondent No.2 in which the respondent No.2 had mentioned that the goods to be imported and named therein will be sold on high seas basis. It was submitted that the respondent No.2 had confirmed by its communication dated 19-9-2001 which was submitted before the revised price bids were opened that it would be abiding by the terms and conditions communicated by the respondent under its letters dated 4-9-2001, 5-9-2001 and other communications and therefore, the subsequent letter dated 10th July 2002 to the respondent No.2 sent by the respondent No.1 was only intended to get re-confirmation from the respondent No.2 and the effect of re-confirmation was that the notes Nos. 2 and 3 put by the respondent No.2 in Schedule - B of prices regarding sale on high seas basis and exchange variation, stood withdrawn, and therefore, since no such conditions remained, there could arise no question of loading the revised price bid of the respondent No.2, which was opened on 19th September 2001. It was submitted that the communication dated 10th July 2002 sent by the respondent No.1 to the respondent No.2 was not a negotiation at all and the respondent No.1 was only getting earlier terms re-confirmed. It was also contended that the contention which was developed during the arguments on behalf of the petitioners that the respondent No.2 had given its confirmation letter on 19-9-2001 though it was required to be given on 18-9-2001, as per the communication dated 15-9-2001 of the respondent No.1, was only in respect of a procedural relaxation and no essential condition of the contract was thereby violated. It was argued that the respondent No.1 could relax such requirement, which was not a deviation from the terms and conditions of tender, by taking the confirmation letter of the respondent No.2 on 19-9-2001 instead of 18-9-2001, which was the last date for sending confirmation as stipulated in the letter of the respondent No.1, dated 15-9-2001.

5.2 In support of his preliminary objection, the

learned senior counsel heavily relied upon the decision of the Supreme Court in Raunaq International Ltd. v. I.V.R. Construction Ltd., reported in (1999) 1 SCC 492, in which the Supreme Court held in paragraph 8 of the judgement that the challenger, M/s I.V.R. Construction Ltd. also did not fulfil the qualifying criterion of having laid pipeline for a distance of 3 KMs, and that in these circumstances, "we fail to see any basis for passing the impugned order". Reliance was also placed on the observation made in paragraph 27 of the judgement, in which the Supreme Court held that the relaxation was permissible under the terms of the tender, and was granted to M/s Raunaq International Ltd. on valid principles looking at the expertise of the tenderer and his past experience although it did not exactly tally with the prescribed criteria. The Supreme Court further held : "What was more relevant, M/s I.V.R. Construction Ltd. who have challenged this award of tender themselves do not fulfil the requisite criteria. They do not possess the prescribed experience qualification. Therefore, any judicial relief at the instance of a party which does not fulfil the requisite criteria seems to be misplaced. ..... "

5.3 The learned senior counsel also relied upon an order of this Court made on 12-8-2002 in Special Civil Application No. 6511 of 2002 for pointing out that, in a case where the expert committee of the Board noticing that the certificate produced by the petitioner regarding experience did not contain details and did not mention quantity dealt with and the activities undertaken by the petitioner, and after considering the relevant aspects, found that the bidder was disqualified against the criteria of experience, it was held that the decision of the Board in not accepting the technical bid of the petitioner could not be said to be arbitrary or illegal and the petition was summarily rejected.

6. The respondent No.1, while inviting sealed tenders for the Akrimota Thermal Power Project, gave technical specifications, schedules and general terms and conditions in various sections of the tender documents. Volume I contained terms and conditions for turnkey execution of material handling plant with auxiliaries. In section (A) thereof, the instructions to the bidders were incorporated. Instructions in clause (6) provided that, "Issuance of tender Documents will not be construed to mean that such bidders would be automatically considered. Only bids, responsive to technical specifications and general terms and conditions and complying the requirements thereof shall only be

considered". As per clause (8) of the instructions, the offer was to be made by the tenderer in two parts, namely, Technical and Commercial Bid - Part I (unpriced bid) and Price Bid - Part II. Adequate cross-references shall be given, if required, to enable to correlate details of both the Bids. The price bid was to contain only prices as per the schedules and also additional / alternative prices, if called for. Clause (10) did not contemplate ay price bid variation.

6.1 Tender terms and conditions incorporated in section (c) of Volume I of the Tender Documents contained various clauses, of which, the following (emphasis supplied) were referred to during the hearing :-

"2. Instructions to Bidders :

(a) xxxxx

(b) xxxxx

(c) Prices quoted should be firm, and the same will not be subject to any price escalation till completion of work except of statutory variation in excise duty and sales tax.

Purchaser prefers the prices on divisible contract basis and therefore, please quote separately as under :

I) Supply prices (item-wise)
II) Erection, testing and commissioning charges

For supervision of Erection of and commissioning per-day rates shall be quoted in the price bid.

The tenderer should quote prices only on free delivery at our power project site on door delivery basis. The rates other than project basis will not be considered, unless and otherwise called for.

The price schedules accompanying the technical specifications indicate the type of contract sought whether unit prices or lump sum and shall be duly filled in.

(g) i. Bidder's specific attention is invited to the requirement that the price quoted in the bid shall be based on furnishing all materials and services completely in accordance with the bid specifications and attachments thereto.

ii. Incomplete bids and amendments and additions to bids after opening of price bid may not be considered.

xxxxx

"(i) The prices quoted shall be based on delivery F.O.R. project site."

19. Taxes, Duties, etc. :

Sales Tax / Central Sales Tax shall be paid extra as applicable. (In case of indivisible works contract, no sales tax is applicable and therefore will not be paid. Tenderer has to confirm this).

xxxxx

xxxxx

The tenderer should clearly mention, if any tax or duty are included in the quoted prices. The offer should also indicate the rates / amounts of taxes and duties included.

xxxxx

1. Sales Tax :

For sales tax also, the details similar to excise duty as above shall be furnished.

xxxxx

2. Sales Tax on Works Contract :

..... However, the bidder shall indicate expressly specifying the items subject to Sales Tax indicating the value and rates while quoting the price. .....

27. Title :

"Both legal and equitable title to all the material, equipment and apparatus covered by the contract shall pass to the purchaser as and to the extent the prorata contract price of the material, apparatus or equipment is paid. Nothing in this paragraph shall be construed as releasing or waiving any responsibility of the supplier hereunder, but on the contrary, the supplier shall remain as fully responsible as though this paragraph was not contained herein."

6.2 The general terms and conditions for packing and transport and for the erection of material etc. were contained in Parts II and III of section (C) in Volume I of the tender documents. Clause (6) relating to transit insurance in Part II section (C), inter alia, provided as under :

"6. Transit Insurance :

Since the prices expected are F.O.R. destination, the transit insurance will be arranged by the supplier at his cost.

Supplier will be fully responsible for all losses / damages during transit and the purchaser will be fully indemnified against such losses / damages.

xxxxx

xxxxx "

Clause 24(a) of the general terms and conditions for erections of material (Part III of section 3 in Volume I) relating to taxes, reads as under :

"24. Taxes :

(a) General Taxes :

The contractor shall be responsible for and shall

pay out of his own moneys, all taxes, dues fees, cesses, octroi and charges payable to Central or State Governments or dues payable on material purchased by him or constructional plant provided by him for the works, and on all materials brought by him on the site and used for the works and shall indemnify the purchaser against any liability on account of any such taxes, dues, fees, cess, octroi and charges.

6.3 Volume II of the Tender Documents contained Updated Technical Specifications for Material Handling Plant with Auxiliaries. These technical specifications are regarding system description, required equipment and services, material handling plant, equipment design criteria and technical specifications, bunker filling facilities, handling facilities, general erection requirement, quality assurance programme, bids evaluation amongst other specifications. From Clauses II.3.10.1, 3.20.2, 4.01.1 (Sr.No.11), 4.01.2 (Sr.No.1 & 3), 8.26.2, 8.31, 10.01.2 (Sr.No. c & d), 11.13, 16.30.3 (a, c & d), 16.30.4, it was pointed out by the learned Senior Counsel for the respondents that, in these clauses, there was specific mention of "Sizers" as well as "Impact Crushers" which were to be supplied as the machinery in the two plants of the project. The learned Senior Counsel for the petitioners, referring to Clauses 8.26, 8.26.3, 11.13, 16.30.3, on the other hand, submitted that "Sizers" were described in these clauses as "Sizer Crushers" and therefore, Sizers were also a type of Crushers which expression included both Sizer as well as Impact Crushers. It was submitted that, in clause 16.30.4, there was in fact no mention of "Sizer" but "Roller Crusher" was mentioned in place of "Sizer".

6.4 On the aspect of guarantee of total power consumption, both the sides referred to the following clauses :

"II.16.30.4 Bidder shall guarantee the total power consumption required at the input terminals of drive motors of the following equipment at the above mentioned guaranteed capacity performance requirements.

All Conveyors, Belt feeders, Feeder breaker, Vibrating feeder, Eccentric disc / Roller screen, Flip flop screens, Roll Crusher, Impactor crushers, magnetic separators, Stacker cum Reclaimer,

connected to one stream.

II.16.30.6 Liquidated Damages for Power Consumption :

II.16.30.6.1 If the total power consumption at the input terminals of various drive motors exceed the guaranteed figure of power consumption, the liquidated damages shall be payable by the contractor at a rate of Rs.1,00,000/- per KW of excess power consumption over the guaranteed figure."

6.5 On the aspect of bid evaluation, the following clauses were referred :

"II.17.00 BID EVALUATION :

II.17.01 The bids will be evaluated based on the following evaluation criteria for award of Turnkey Contract for the material handling plants equipment with auxiliaries. The bids would be evaluated based on the technical bid & commercial bid and the price bid. On completion of the technical and commercial bid aspects evaluation, price bids would be opened.

II.17.02 Evaluation of Proposals :

The contract price, as quoted would be technically evaluated with the objective of bringing all the bidders at par to the extent possible, on specified technical parameters. To the above, price quoted would be adjusted to factor in the commercial issues, terms & conditions of the bid. The difference in auxiliary power consumption shall be loaded Rs.1,00,000 per KW. ..... "

6.6 The frozen (mechanical) requirements for all the bidders in the revised price bid called for by letter dated 4th September 2001, at Annexure "C" to the petition, included in Annexure II thereof, sizing machines and impactor crushers, at items 8 and 9.

6.7 The General (Commercial) Points to be considered by all the bidders for their revised price bid in Annexure IA to the letter of the respondent No.1, dated 5-9-2001, at Annexure "D" to the petition, contained the

following commercial points at Srl.No.5 :

"5. i. The prices shall be firm and no escalation allowed.

ii. Only statutory variations shall be payable on taxes and duties in percentage.

iii. Exchange rate variation shall not be payable." (emphasis added).

6.8 By letter dated 15th September 2001, at Annexure "E" to the petition, inviting tenders latest by 19th September 2001 at 15.00 hrs., the bidders were instructed to specifically confirm adherence to all the requirements of GMDC finalised after the post bid meetings and intimated to them under the letters dated 4-9-2001, 5-9-2001 and 7-9-2001 latest by 18-9-2001 with a warning that the price bid will not be opened if the confirmation was not received and that "deviations are not acceptable".

7. It will be noticed from the settled legal position emanating from the decisions of the Apex Court referred to earlier in para 4.1, that the rule against arbitrariness is firmly established if in the decision making process the State agency in exercise of its procurement functions acts in an unreasonable, arbitrary or malafide way or in disregard of the mandatory procedure, and that when an essential condition of tender is not complied with, the tender may be rejected by the authority. The question therefore is whether the conditions of tender in respect of which non-compliance is alleged against the respondent No.2 were essential or merely ancillary.

7.1 A legally enforceable agreement can only be created when the essential elements of a contract are present. There must be an offer by one party and acceptance of that very offer by another party supported by valuable consideration together with the intention and capacity of the parties to be bound in contract. It was argued on the basis of the instructions to the bidders and the terms and conditions of the tender that the deviations in the revised price bid of the respondent No.2 were in breach of the tender requirement that no price variation will be allowed, and that the delivery was to be on project site basis. On the other hand, the respondent No.1 - Corporation has contended that the petitioner was not the lowest tenderer and no useful

purpose would have been served by loading its revised price bid and that since there were deviations in the petitioner's offer, it was ineligible and therefore, the plea against the validity of the offer of the respondent No.2 cannot be entertained at the behest of the petitioner.

8. Most commonly, the Government agencies will be requesting offers for supply, works and services. The request for tender which is sometimes called invitation to treat is not an offer. The tender, bid or quote received from a supplier or a provider of service is an offer. Fixing of terms and condition is an important part of managing procurement functions. It underpins the achievement of value for money and the ultimate object of the procurement. Therefore, when the terms and conditions on which the offers are invited are indicated by the State agency, the offer made by the tenderer which is not in compliance of such terms and conditions may not be accepted by the agency. Where a public body enters into a contract with a supplier, a dispute arising out of the contract will often be determined as per the terms of the contract by private law proceedings. However, the decision of a public body to enter or not to enter into a contract may be subject to judicial review which is the primary mechanism for enforcing rule of law by reviewing the legality of the decision. The Court can examine whether in exercise of statutory discretion, such decision is taken lawfully and whether it constitutes abuse of power. If the decision is purely commercial, the Court will not ordinarily intervene, but if there is some ulterior purpose or excess or abuse of power, the Court will do so and is entitled to examine the motives of a public body.

8.1 The authority must choose between one of the three procedures for its procurement functions; the open procedure permitting all interested suppliers to tender, the restricted procedure permitting suppliers invited to participate by the contracting authority to the tender, and, the negotiated procedure under which direct discussions and negotiations take place between the authority and one or more suppliers of its choice in certain circumstances. Once a call for competition has been advertised, the authority is ordinarily bound to proceed with the procedure it has chosen. Should it find necessary to resort to negotiations amongst those who responded to the call for competition by submitting their tenders, it must do so in a manner which is non-discriminatory which postulates that there should be negotiations with all concerned and not a secret

negotiation with a chosen participant to oust others. There should be no discrimination in the award of major contracts for public works, supplies and services by a Governmental agency whose freedom to decide tender it will accept is, unlike in case of procurement by a private party, circumscribed by the mandate of Article 14 of the Constitution which forbids discrimination amongst those who are similarly situate.

8.2 In the present case, the facts on record clearly establish that, after having been told in no uncertain terms by the communication dated 15-9-2001 inviting revised price bids from the bidders that no deviation will be allowed and though this stipulation was specifically confirmed on 19-9-2001 when the revised bids were given and opened, the bid of the respondent No.2 showed in Schedule - B i.e. the Schedule of Prices that, while quoting "lumpsum price for design, manufacture, supply and delivery F.O.R. Akrimota Site including packing, forwarding, transporting to site, unloading at site, storage at site", at the end of this price quotation, following foot-notes were added :

"2. We shall arrange sale on high seas for the imported items like Sizer / Crusher and Flip flop (sic) Screens. The purchaser shall render all procedural assistance to operate sale on High Seas basis. The purchaser shall pay custom duty directly to the custom authority and recover the same from the outstanding bills.

3. Exchange Rate Variation

The exchange rates considered as on 5-9-2001 are as below :

Pound 1 = Rs.68.31
US $1 = Rs.47.37
Euro 1 = Rs.42.09

Any variations in the exchange rate on the date of clearance of imported consignment from the custom will be to purchaser's account."

8.3 Thus, out of the material which was to be supplied and transported to the Akrimota Project Site, the imported items mentioned in the above note No.2 namely, "items like sizer / crusher and flip flop Screens", were to be sold to the respondent No.1 on "High Seas Basis" and the respondent No.1 purchaser was

expected to render procedural assistance to operate sale on high seas basis which stipulation was altogether different from the tender condition requiring supply and delivery F.O.R. Akrimota site. It is significant to note that this condition of supply of the goods which were to be imported by the respondent No.2 has not been separately mentioned in any deviation schedule, but is an integral part of the prices quoted in the schedule of price (Schedule - B). The offer of price made by the respondent No.2, thus, did not conform to the essential terms of the tender conditions that "the tender should quote prices only on free delivery at our power project site on door delivery basis" under clause 2(c) in which it was clearly warned that "the rates other than the project basis will not be considered, unless and otherwise called for", and again stipulated in clause 2(i) that, "the prices quoted shall be based on delivery F.O.R. Project Site". Having confirmed by its letter dated 19-9-2001, (copy at Annexure "5" of the affidavit-in-reply of the respondent No.1) that the respondent No.2 was adhering to the requirements of the respondent No.1 finalized after the post bid meetings conveyed through the letters of the respondent No.1 dated 4-9-2001, 5-9-2001 and 7-9-2001, the respondent No.1 quoted the above prices in Schedule - B of the tender with a rider that the sale of the items mentioned in note No.2 will be arranged by it on the high seas basis. The mode of delivery at site which was stipulated was thus changed in respect of the said import items which were major items of a considerably high value.

8.4 In fact, the specific confirmation regarding adherence to all requirements, as sought for in the letter dated 15-9-2001 of the respondent No.1, was to be given by the respondent No.2 latest by 18-9-2001 and it was stated thus in that letter (a copy of which is at Annexure "3" to the affidavit-in-reply of the respondent No.2) : "If this confirmation is not received, the price bid shall not be opened". The confirmation letter was, however, written by the respondent No.2 on 19-9-2001 (a copy of which is at Annexure "4" to the affidavit-in-reply of the respondent No.2), and if the instructions given by the respondent No.1 in its letter dated 15-9-2001 were to prevail, it could not have been opened on 19-9-2001, because, the last date of intimating a specific confirmation was fixed as 18-9-2001 by the respondent No.1. The respondent No.1, however, opened the tender of the respondent No.1 on 19-9-2001 despite the above stipulation in its letter of 15-9-2001.

9. As noted above, on 19-9-2001, when the tenders

were opened, the bid of the respondent No.1 was hedged with the two conditions mentioned in the notes No. 2 and 3 of the Schedule of Prices. Having given a price quotation against the stipulation that the delivery was to be at the project site, the respondent No.2 was given a stealthy opportunity by a belated communication of July 10, 2002, (a copy of which is at Annexure "6" to the affidavit-in-reply of the respondent No.1), now in context of its revised bid, to confirm the points mentioned therein. The relevant portion of this short but significant letter of the respondent No.1 to the respondent No.2, reads as under :

"Dear Sir,

With reference to your revised price bid referred at Sr.No.4 above, please arrange to confirm the following to enable us to conclude on the issue :

1. Amount of Service tax / Excise Duty included in item No.2.01 (a) to be specified with %age thereof.

2. The rate of Excise duty specified as 5% to 16% to be identified.

3. Works Contract Tax on 2.12 (a) if becomes applicable shall be the responsibility of the supplier.

4. High Sea Sale is not permitted.

5. Exchange Rate variation is not permitted.

Your expeditious reply in above regard shall help us to finalize the matter at an early instance.

Thanking you,

Yours faithfully,
For GMDC Ltd.

[S.B.VORA]
GENERAL MANAGER [POWER]"

9.1 The respondent No.2 promptly confirmed all the above points on that very day, as per the endorsement appearing below the said letter :

"To GMDC

We hereby confirm that all the points, raised in this fax (from point 1 to point 5) shall be complied with, by us.

For TRF Ltd.

[K.K.Singh]
Sr.Divisional Manager [Marketing]"

9.2 The Letter of Intent was issued by the respondent No.1 to it on the next day i.e. on 11-7-2002 and the Work Order on 26-7-2002 after this petition was filed on 19-7-2002, in respect of which, the respondent No.1 had filed caveat on 15-7-2002.

9.3 Once the open procedure permitting all the interested parties to tender was adopted, the respondent No.1 could not have resorted to any discussion or negotiation with the respondent No.2 alone by letter dated 10th July 2002 after the bids were opened on 19-9-2001 and the revised bid of the respondent No.2 was found to be not acceptable, without making it agree to the aforesaid five points mentioned in the said letter including the two crucial aspects regarding "high seas sale" and "exchange rate variation". Such a course clearly discriminated against the other tenderers including the petitioner with whom no such negotiation for enabling alteration in the price bid was at all made. The action of the respondent No.1 in approaching the respondent No.2 by letter dated 10th July 2002 and enabling it to change its stipulations of price bids quoted in Schedule - B by it, so that the contract could be awarded to it, was clearly discriminatory against the petitioner and violative of Article 14 of the Constitution. It is settled law that the decision making process can be examined by this Court in its power of judicial review and the Court can intervene in cases where discrimination is practised.

10. Heavy reliance was placed on behalf of the respondent No.1 and 2 by their learned senior counsel on Raunaq case (supra) in support of the contention that the respondent No.1 had all the power to relax the conditions of tender and award the contract to the respondent No.2, whose tender was the lowest. There can be no dispute over the proposition that the State agencies exercising their procurement functions by inviting offers for work or services have the necessary leeway, in their

commercial wisdom, to act in their best commercial interest and therefore, may relax a requirement, which it was permissible to be relaxed under the terms and conditions announced, in a manner which is not discriminatory and calculated to favour the beneficiary of such relaxation. The power of relaxation of a non-essential condition of a tender will, however, not included the power to allow a chosen tenderer to change the material aspects of its price bid. As noted above, it was stipulated in clause (6) of instructions to the bider that "only bids responsive to technical specifications and general terms and conditions and complying with the requirements thereof shall only be considered". The prices were required to be quoted only as per the Schedule under clause (8) (Part II) of the instructions and as provided under clause 2(g)(ii) of the tender terms and conditions, incomplete bids and amendments and additions after opening the price bids were not to be considered.

10.1 The letter dated 10th July 2002 written by the respondent No.1 only to the respondent No.2 nearly ten months after the revised price bids of all tenderers were opened, was clearly calculated to give to the respondent No.2 an opportunity to alter its bid, after it was opened by removing the two vital conditions that it had incorporated in the Schedule of Prices in notes No. 2 and 3, by which, the lumpsum price was quoted in the price bid on the footing that the machinery required to be imported was to be sold by the respondent No.2 to the respondent No.1 on high seas basis and adverse exchange variation was on the account of the respondent No.1. The high seas sale clause would have meant that the risk in respect of all such goods would pass to the respondent No.1 alongwith the title, in view of the stipulation contained in clause 27 of the terms and conditions of tender, at the time when the sale takes place on high seas and not at the delivery site, as was required by the essential terms and conditions of the contract announced with the instructions to the tenderers. Under section 26 of the Sale of Goods Act, unless otherwise agreed, the goods remain at seller's risk until property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk, whether delivery has been made or not. Therefore, the condition imposed by the respondent No.2 while quoting the bid price in Schedule B was a significant departure from the basis on which the price bid was invited by the respondent No.1 and it could not have been accepted by the respondent No.1, because, the revised price bid of the respondent No.2 did not comply with the

mandatory instructions that, "the tenderer should quote prices on free delivery at our power project site door delivery basis" in clause 2(c), and that "the price shall be based on delivery F.O.R. project site" in clause 2(i) of tender terms and conditions.

10.2 Thus, it is not as if the respondent No.1 exercised any legitimate power of relaxation, but instead, it showed a special favour to the respondent No.2 by allowing it to alter its revised price bid by removing the conditions that it had incorporated by notes No.2 and 3 while quoting the price in Schedule - B. Admittedly, such opportunity was not given to anyone else including the petitioner who was the next lowest bidder by Rs.24 lacs for enabling it to alter its price bid.

10.3 The significance of the concession shown to the respondent No.2 by the respondent No.1 of allowing it to alter its price bid by its letter dated 10-7-2002 can be gauged also from the fact that, if sale of the items to be imported was allowed to take place on high seas basis, sales tax at 4% would not have been required to be paid and therefore, to that extent, the respondent No.2 would have benefitted since the sale and delivery at project site would have entailed payment of sales tax of approximately Rs.30.05 lacs by the respondent No.2, as per the petitioner's calculations, on such goods, which could be avoided by it on the sale transaction taking place on the high seas. The respondent No.2 would have also realised the sale price of those goods earlier than stipulated and, as noted above, been relieved of the risk being attached to the goods sold on high seas which would have, under the terms of the contract, continued on it till the site of delivery and when title passed to the respondent No.1 under clause 27 of the terms and conditions of the contract.

10.4 The assertion of the petitioner that payment of sales tax was meant to be avoided by the respondent No.2 by incorporating the stipulation in the price bid that the goods to be imported will be sold on high seas basis has been met by the respondent No.1 in paragraph 5.2 of its affidavit-in-reply to the additional affidavit of the petitioner by simplying stating that even in case of high seas sale assuming that GMDC was required to pay port clearance and forwarding charges, it would have recovered the same from the respondent No.2 and that no sales tax would have been required to be paid by it. This is an over-simplification of the issue, for the simple reason, that sales tax was payable by the respondent No.2 if the goods were to be sold and delivered at the project site

where alone the title under the terms of the contract passed to the respondent No.1, which payment was sought to be avoided by the respondent No.2 by incorporating sale on high seas clause in note No.2 of its price bid. The question was not of any increase in liability of the respondent No.1 regarding sales tax, but it was avoidance of the sales tax by the respondent No.2 and the consequential gain to it to the tune of nearly Rs.30 lacs, as alleged, from the total firm price quoted by it. Therefore, even if the price bid of the respondent No.2 were to be evaluated, as it stood without allowing it to alter the same as was sought to be done by the respondent No.1 through its letter of 10th July 2002, the bid of the respondent No.2 ought to have been evaluated keeping in mind that the price quoted by it was on the footing that the import items will be sold on high seas basis and therefore, the amount quoted did not include the sales tax component in respect thereof, so that the bid of the respondent No.2 could be equated for a just comparision with the price bid of the tenderers, who had quoted the price on delivery at site basis and therefore, had included the sales tax component in the total price quoted by them in their price bids. The price bid of the respondent No.2 as per Schedule - B did not, in reality, include the sales tax component in respect of the goods which, as per note No.2 of its schedule of prices, were to be sold on high seas basis. One cannot compare the price quotation which included sales tax component with the price bid which would not have included sales tax component due to the high seas sale clause and say that the price quoted by the bidder without including sales tax component which was includible in it as per the stipulation, was lower than the price quoted by another bidder by including the sales tax payable on the goods which alone was the way of giving quotation as per the instructions to the bidders. By straightaway accepting the bid of the respondent No.2 without evaluating it on the basis of two material clauses of "high seas sale" and "exchange rate variation" for comparison with others bids, and instead, giving an opportunity to the respondent No.2 to alter its price bid by withdrawing its stipulations which were contrary to the tender conditions, the respondent No.1 has acted in a discriminatory manner against the petitioner and such a course adopted by it has vitiated the decision making process and is in gross violation of Article 14 of the Constitution.

10.5 Not only the impact of the sales tax components on goods stipulated to be sold on high seas basis was ignored in the price bid of the respondent No.2, but the

impact of payment of port charges and interest on custom duty was also ignored for the purpose of evaluation of the bid of the respondent No.2. According to the petitioner, the interest on the amount of custom duty, that would have been paid by the respondent No.1 instead of the respondent No.2 paying it, on goods sold on the high seas and brought to land, for six months, would have come to Rs.11,90,000=00, and that amount should have been loaded in the price bid of the respondent No.2, while according to the respondent No.2, as stated in paragraph 5.5 of its affidavit-in-reply, even if the price offered by the respondent No.2 was to be loaded on this count, the loading would be of Rs.1,37,812=50 for interest and Rs.12,10,000=00 for port charges, aggregating to Rs.13,47,812=50 which was lower than the difference of Rs.24,00,000=00 in the price worked out by the petitioner in paragraph 4.2 of the petition.

10.6 By the stipulation in note No.3 in Schedule of Prices of the revised price bid of the respondent No.2, it had stipulated that any variation, in the exchange rate as on 5-9-2001, on the date of clearance of imported consignment from the custom will be to the purchaser's account, which means, if the exchange rate of 1 pound = 68.31, US $ 1 = 47.37 and Euro 1 = 42.09, as it stood on 5-9-2001, increased, the additional burden was to be borne by the respondent No.2. Therefore, the bid price quoted by the respondent No.2 was not firm, as the respondent No.2 was entitled to recover the difference due to variation in exchange rate from the respondent No.1, if it created additional burden on the respondent No.2. It was specifically provided by tender condition No.2(c) and the letter dated 5-9-2001 inviting the revised price bids in clause 5(iii) of its Annexure "1", that price quoted should be firm and the same will not be subject to any price escalation till completion of work and that exchange rate variation shall not be payable. The exchange rate variation clause stipulated in note No.3 of the price bid of the respondent No.2 was thus clearly contrary to the said bid conditions which required firm price to be quoted and under which no such increase could be claimed.

10.7 The stand of the respondent No.1 in paragraph 5.4 of its reply dated 4-9-2001 is that exchange rate variations would have an upward or downward movement and it would be difficult to predict whether on the date of clearance of the imported consignment, one Euro would be equal to Rs.42=09 paise or lower or higher than that. It is admitted in that paragraph that, in July 2002, one Euro was equal to Rs.49=00 and in August, 2002, it went

down to Rs.47=00 which figure was higher than Rs.42=09 paise taken as the basis by the respondent No.2 for comparing the future variation in the exchange rate. The respondent No.1 instead of judging the price bid of the respondent No.2 as it was, and ignoring the fact that the variation in exchange rate clause stipulated in note No.3 of its schedule B of Schedule of Prices directly violated the conditions of the tender that the price quoted should be firm and no escalation or exchange variations will be allowed, gave a rejuvenating opportunity to the respondent No.2 by its letter dated 10th July 2002 to wriggle out the imbroglio that could have nullified its tender as non-responsive, because of "sale on high seas" and "exchange rate variation" clauses included by the respondent No.2 in its price bid contrary to the tender conditions. This special opportunity given to the respondent No.2 to withdraw the "high seas sale" and "exchange rate variation" clauses in notes No.2 and 3 of its price bid in Schedule - B was a stark instance of favouritism towards the respondent No.2 when none other were bestowed upon such favour of an opportunity to alter the price bid in any manner.

10.8 The respondent No.1 admittedly did not evaluate the bid of the respondent No.2 in respect of "high seas sale" clause and "exchange variation" clause which might have tilted the balance in favour of the petitioner, but instead gave a golden opportunity, after eight months of the opening of the revised price bids, to the respondent No.2 to withdraw its two major stipulations in notes No.2 and 3 from the price bid, which the respondent No.2 gladly grabbed. This arbitrary action on the part of the respondent No.1 most mildly viewed can be said to be suffering from legal malafides, discriminatory and grossly violative of Article 14 of the Constitution.

11. In the above background of the matter, the learned senior counsel appearing for both the respondents Nos. 1 and 2 laid heavy emphasis on the preliminary objection raised by these respondents against the maintainability of the petition at the instance of the petitioner on the ground that the petitioner was not eligible on certain counts and went to remind us that this was not a public interest litigation to warrant the Court to inquire into the validity of the acceptance of the tender of the respondent No.2 by the respondent No.1 at the instance of the petitioner, who had deviated from the terms of the tender in its offer. Three deviations were attributed to the petitioner which we may now proceed to consider.

11.1 The first alleged deviation was that the petitioner did not quote separate prices, in its Schedule - B of prices in respect of the lignite handling plant and the lime handling plant, but had quoted a lumpsum price of Rs.74,39,45,000=00 for both. It would appear from Schedule - B of prices filed by the petitioner that the requirement of the schedule was to provide lumpsum firm price for design, supply and delivery F.O.R. Akrimota site of the material (lignite & lime) handling plants, with auxilliaries including packing, forwarding, sales tax charges and excise duty charges etc. ....., but exclusive of recommended spares as below;

"(a) For lignite handling plant as specified as per enclosed layout drawing including sizer, stacker cum reclaimer and crusher system for lignite and other systems as specified.

(b) For lime handling plant as specified as per enclosed layout drawing including sizer, impact crushers and other systems as specified"

11.2 This would mean that the lumpsum price quoted was to be the exclusive of the recommended spares. The price of recommended spares, common for both lignite and lime handling system, was separately mentioned in column 2.05 of the Schedule - B as Rs.1,71,65,000=00 with a note that "the price of recommended spares indicated at Srl. No. 2.05 was not included in total price at Srl. No.1 on Sheet 1 of 16 of this Schedule". In this regard, we may note that, admittedly, the price bid of the petitioner was not rejected by the respondent No.1 on the ground that, in the Schedule of Prices of its tender, the petitioner did not quote separate price for each plant at Srl. Nos. 1(a) and (b) and did not give a break-up of ex-works firm price of material plant equipment or had failed to give in the schedule of prices, the unit price for material plant components. This fact is categorically admitted by the respondent No.1 in paragraph 5 of its affidavit-in-reply dated 4-9-2001 which deserves to be re-produced hereunder :

"With reference to second respondent's Schedule of prices (pp 199 to 208), I beg to point out that unlike the petitioner, TRF submitted separate prices for lignite handling plant and for lime handling plant and given break up price for item 1.00 as well as break up of ex-works

> firm price of material handling plant equipment as per 2.02(a). It is true that the second respondent has not given schedule of unit prices for material handling plant components in serial No. 4.0 of Schedule of prices. However, I state that the price bid of the petitioner was not rejected on the ground that the petitioner in Schedule of prices of its tender did not give break up of ex-works firm price of material handling plant equipment as per 2.02 (a) or had failed to give in the schedule of price unit price for material handling plant components. I submit that this aspect has been referred to in the affidavit-in-reply on behalf of the GMDC only in support of the preliminary objection that the petitioner is not entitled to maintain the petition. " (emphasis added).

11.3 The other ground urged against the maintainability of the petition was that while quoting lumpsum price at Srl.No.1 of Schedule - B (Annexure 2 to the affidavit-in-reply of the respondent No.1), at item 1(a), in the column of description, "crusher" was mentioned in place of "sizer" which was in the Proforma Schedule B of the Updated Tender Specifications and therefore, the petitioner would have supplied only crusher and not sizer which was the recommended spare. The petitioner's case was that sizers were in fact enumerated in clause (3) of its price bid in Schedule - B at Srl.No.3.2 and 3.5 and the lumpsum supply firm price for the material handling plant equipment mentioned in clause 2.02 (a). According to the petitioner's learned counsel, the word "crusher" came to be retained in the description column, because, in the tender stipulations the proforma of Schedule B i.e. the Schedule of Prices, "Roll Crusher" was mentioned and not "Sizer". However, the petitioner was to supply sizers and this was never doubted by the respondent No.1 when the technical bid of the petitioner was scrutinized and which included the specifications of sizers. It will be seen from the petitioner's price bid schedule - B that, at Srl. Nos. 4.112, 4.113 and 4.115 (a), there was a clear mention of three types of sizers which corresponded to the frozen plant (mechanical) requirements at item 8 for sizers, in Annexure "II" of the letter dated 4-9-2001 of the respondent No.1 (a copy of which is at Annexure "C" to the petition), by which the revised bids were called for. It will be noted that the sizers are at various places of the Updated Technical Specifications, Volume II, described by the respondent No.1 as "sizer crushers"

also. Crushers can be Sizer Crushers or Impact Crushers as can be seen from Clauses 8.26, 8.30, 16.30.3 of the Updated Technical Specifications. According to the petitioner, as per the details given in the Schedule of Prices, sizers were indeed mentioned and the word "crusher" in the description column in place of "sizer" was only a mistake. We are not concerned with the fact whether the word "crusher" has been written by the petitioner in the Schedule of Prices by mistake or not. Those are the matters which would be for the respondent No.1 to examine and not for the Court. The fact however remains that "crusher" is a genus and "sizer-crushers" and "impact-crushers" appear to be two types of crushers as described at various places of volume II of the tender documents. The respondent No.1 never sought any clarification from the petitioner on this aspect of the matter and had proceeded to consider the price bid after scrutinizing the technical bid in which particulars about the sizers as well as impact crushers to be offered were to be mentioned. Again, this, admittedly, was never the ground for rejecting the bid of the petitioner by the respondent No.1, and as stated by it in paragraph 7 of the affidavit-in-reply dated 29-7-2002, the bid of the respondent No.2 TRF was accepted as it was the lowest bidder and that, its tender was found to be most competitive and in the interest of the respondent No.1. In paragraph 6 of the affidavit-in-reply, it was asserted that the respondent No.2 being the lowest bidder, it was not necessary to examine in detail the question of loading the price. The evaluation of the price bid of the respondent No.2 for comparing it with the price of the petitioner was required to be done as these respective bids stood as on 19-9-2001 when they were opened. The respondent no.1 compared the bid of the respondent No.2 as altered on 10th July 2002 by withdrawing the stipulations of sale on high seas and exchange rate variations with the bid of the petitioner which was without any alteration. The concept of equal opportunity required that both these bids should have been evaluated and compared as they stood when opened, in which event, the price bid of the respondent No.2 would have been required to be loaded on account of deviation clause contained in its price schedule in notes No. 2 and 3. Without doing that, it was erroneous on the part of the respondent No.1 to assume that the price bid of the respondent No.2 was the lowest.

11.4 The third deviation urged as a ground against the maintainability of the petition was that the petitioner had not submitted power consumption as per Schedule-D and instead it had submitted total power consumption

pathwise. It was contended that, the petitioner was required to give total power consumption equipment-wise under clause II.17.00 of the Updated Technical Specifications. It will be noticed from clause 16.30.4 (sheet 213 of the UTS) that bidder was required to "guaranteed the total power consumption required at the input terminals of the equipment mentioned therein at the guarantee capacity performance requirements stated in clause 16.30.3 (on Sheet 212 of the U.T.S.). According to the petitioner, total power consumption required at the input terminals of drive motors would mean such total power consumption of all the motors of the equipments enumerated under clause 16.30.4 and not motor-wise power consumption. Even clause 16.30.6 providing for liquidated damage for excess power consumption provided that if the total power consumption at the input consumption at various drive motors exceeds the guaranteed figure of power consumption, liquidated damages shall be payable by the contractor at a rate of Rs. 1 lac per KW of excess power consumption over the guaranteed figure which according to the learned counsel for the petitioner showed that the emphasis was on total power consumption of all motors and not equipment-wise or motor-wise. Clause 16.30.4.1 required that the equipment common to different path shall be tested for performance once as per the above requirement during testing of particular path and test results of such tests shall be used for other paths, as applicable to common portions. The petitioner had guaranteed power consumption for various paths for the lignite and lime handling system as per Annexure "3" to the reply of the respondent No.1, stating that the guaranteed power consumption was worked out considering the equipments listed under clause 16.30.4 of the specifications. The respondent No.1 admittedly did not seek any clarification on this aspect from the petitioner and did not reject the petitioner's tender on the ground of the alleged deviation which is now proffered as a preliminary objection against the maintainability of the petition on the ground that the petitioner was not eligible. In fact, the guaranteed power consumption of the petitioner was found to be the lowest and that is why, it was, admittedly, adopted as the basis by the respondent No.1 for evaluation of the other bids which were loaded for the power consumption in excess of the petitioner's guaranteed total power consumption at the rate of Rs.1 lac per each additional KW. It is difficult to comprehend that if equipment-wise or motor-wise power consumption was to be indicated as per the say of the respondent No.1, then why the petitioner's guaranteed total power consumption of all motors pathwise given, was adopted as basis for loading

other bids for evaluating them. We are not for a moment suggesting that the petitioner had adhered to the requirements on the aspect of power consumption, but this discussion has become necessary only because, though admittedly the petitioner's bid was not rejected on the ground of any such inconsistency, it is now put up as a ground for holding that the petitioner is ineligible and therefore, no relief can be granted against the respondent No.2 at the instance of this petitioner. The contention now raised by the respondent No.1 in this regard which was not adopted by it for holding that the petitioner's bid was not responsive on this count, cannot be pressed into service for holding that the petition is not maintainable.

11.5 When the respondent No.1 did not reject the petitioner's price bid on the ground that there was any deviation of not giving separate prices for the two plants at Srl. No.1 of the Schedule - B or of not giving break-up of the ex-works lumpsum firm price or sizers were not mentioned therein or that equipment-wise power consumption was not quoted, it does not stand to reason that the grounds that were not made any basis by the respondent No.1 for treating the petitioner's bid as deviating so as to merit rejection should find favour with the Court at the instance of the very respondent No.1 for holding that, the petition was not maintainable due to the alleged non-conformity of the above aspects which the respondent No.1 did not consider to be sufficient for rejecting the petitioner's bid on the ground of impermissible deviations as being non-responsive.

12. The very basis on which the arguments against the maintainability was advanced, in our opinion, is, therefore, fallacious and not even warranted by the decision of the Supreme Court in Raunuq's case (supra). It will be noted from the said decision that, under clause 1.4 of the qualifying criteria, it was provided; "Notwithstanding anything stated above, the owner reserves the right to assess the bidder's capability and capacity to perform, should the circumstances warrant such assessment in the overall interest of the owner". As observed by the Supreme Court in paragraph 8 of its judgement, the case before it was not a case where any malafides had been alleged against any member of the Board, nor was there any allegation of any collateral motive for awarding the contract to Raunaq International Ltd. and that the only ground of challenge in the writ petition was that M/s Raunaq International Ltd. did not fulfill the qualifying criterian of having laid such

pipeline for a distance of 3 KMs. In paragraph 15 of the judgement, the Supreme Court, in terms, held that, where the decision making process had been structured and the tender conditions set out the requirements, the Court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bonafide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of all offers, the Court should hesitate to intervene. In the present case, there is no question of any relaxation being given for bonafide reasons, of the stipulations which were incorporated by the respondent No.2 in its price bid which the respondent No.1 itself found to be objectionable and therefore, enabled the respondent No.2 to withdraw them from the price bid. That surely was not a relaxation for any bonafide reason of a non-essential stipulation. Therefore, the decision in Raunaq's case (supra) cannot assist the respondents.

13. It was urged for the respondents that this Court should keeping in view that the petitioner had mentioned only "crusher" and not "sizer" which was a more expensive item and had not given the break-up of prices for the two plants, decide that the petitioner was ineligible and therefore, this petition was not maintainable since no relief could be given to an ineligible bidder as per the ratio of Raunaq's case. It will be seen that, in Raunaq's case, the petitioner's bid was rejected on the ground that it was ineligible. In the present case, the learned senior counsel has argued that, though the respondent No.1 had not rejected the bid of the petitioner as ineligible on any ground, we should hold so after examining its bid in the context of the deviations alleged for the first time by the respondent No.1 in response to this petition. It will not, in our opinion, be appropriate for the court exercising its power of judicial review to embark upon evaluation of the petitioner's bid and declare that the petitioner was ineligible and then, to reject the petition. Judicial review is for examining the validity of the decision making process and not for undertaking the decision making process of a State agency. The question of eligibility of a tenderer when in issue is required to be decided initially by the State agency inviting tenders. The decision making process is to be undertaken by the State agency, which has to decide on acceptance of a tender, and not the Court. When there is a serious consideration of validity of the tender involved, without the tender bid being evaluated as per the terms and conditions laid down for the purpose by the respondent

No.1, there arises no scope for the Court to decide whether the tender bid was acceptable or not. The process of evaluation of the bids was necessarily to be undertaken by the State agency when the bids were opened and as they stood, for the purpose of finding out as to who was the lowest bidder. Having not undertaken the process of evaluation of the petitioner's bid for the variations now alleged and having proceeded on the footing that the price bid of the respondent No.2 was the lowest, which fact is seriously disputed by the petitioner, the respondent No.1 cannot for the purpose of defeating the petition, ask the Court to undertake the exercise of evaluation of the petitioner's bid and to hold, in retrospect, that the petitioner was not eligible or that its bid was liable to be rejected when it was not in fact rejected on any such ground by the respondent No.1, as admitted before us. This smoke screen of preliminary objection cannot, therefore, hide the illegality committed by the respondent no.1 in the decision making process of allowing the respondent No.2 to alter its bid eight months after it was opened without giving similar opportunity to the other bidders.

14. All the revised price bids were required to be considered objectively and without discrimination and in accordance with the specified criteria. A public authority while performing its procurement functions should recognize its responsibility to strike an appropriate balance between its legitimate requirement that it should be free to perform its proper functions on behalf of the public and the corresponding requirement that it should have due regard for the legitimate rights and interests of the individual and group of individuals. When a public authority falters and violates rule of law by exercising its power to make contracts arbitrarily and acts with unjustifiable differentiation denying equality of treatment, as has happened in the present case, there needs to be a means of redress and the Court can intervene to correct such wrong.

15. For the reasons that we have given hereinabove, we are convinced that the decision of the respondent No.1 in awarding the contract to the respondent No.2 is discriminatory, arbitrary and smacks of favouritism and therefore, unconstitutional and void being violative of Article 14 of the Constitution. The impugned award of contract by the respondent No.1 to the respondent No.2, by issuing the impugned Letter of Intent and the Work Order consequential thereto, is, therefore, hereby set

aside, with liberty to the respondent No.1 to re-consider the bids of the parties in accordance with law and the essential terms and conditions notified by it for the contract. Rule is made absolute accordingly with no order as to costs.

[R.K.ABICHANDANI, J.]

[KUNDAN SINGH, J.]

parmar*